consider whether termination was on November 30, 1972 upon the pleadings.

Here we need only refer to the following cases for the proposition that the guarantee would be in respect of liabilities incurred after the date thereof: — *Wood* v. *Benson,*[1] *Morrel* v. *Cowan*[2] and *Sigma Cable Co. Ltd.* v. *Nam Huat Electric & Sanitary Co. & Ors.*[3]

In all these cases, the courts were of the view that the guarantor was liable only for debts or liabilities incurred after the date of the guarantee.

Despite the loose wording of the Letter of Guarantee, we agree with the learned judge that it cannot be impugned on grounds of absence or want of consideration. Having found there was no basis for challenging the validity of the guarantee, the learned judge gave judgment in favour of the respondent for the sum of $100,000 as claimed in terms of P1.

With respect, we do not think upon the evidence given on benalf by respondent that a sum of about $51,000 only was due from April 3, 1972 to July 31, 19/2 in respect of premia due from 1st defendant that the respondent can seek to benefit from the obvious intention benind the said letter to indemnify the respondent from losses up to $100,000 only for and resulting from continuing the agency of the first defendant after April 3, 1972. There was no expression of intention, nor can we be justified in holding, that the appellant accepted and/or undertook liabilities prior to April 3, 1972.

As we have stated earlier, the letter was loosely worded. We do not think that, having regard to the *contra proferentem* principle, the construction should be that the appellant undertook as a condition of *continuing,* not *giving,* the agency (which already existed but was under threat of termination), to accept liability for sums incurred prior thereto and which were not communicated to, nor contemplated by, him. There was in our view, a question of construction of the Letter of Guarantee as to the operative date and the extent of liability. Noting that the extension was granted for just over 4 months, it seems to us that advantage was taken of the appellant to make him liable to contribute towards repayment of liabilities incurred before April 3, 1972, that is, before the date of the guarantee and in the absence of express acceptance or undertaking of liability therefor.

We would allow the appeal to the extent that the order for payment of the sum of $100,000 in terms of the Letter of Guarantee of April 3, 1972 be varied to one for payment of such sum as may be found due by the Senior Assistant Registrar in respect of policies sold and premia collected in respect of the operative date of the guarantee namely April 3, 1972 up to July 31, 1972 up to a limit of $100,000.

Order for costs awarded in the court below is not affected but there will be order for costs to appellant in this appeal and refund of deposit.

Order accordingly.

Solicitors: *Ong Chin Beng & Partners; Tunku Zuhri, Manan & Abdullah.*

SOH BOK YEW v. CINDEE DEVELOPMENTS SDN. BHD.

[F.C. (Ali Ag. C.J. (Malaya), Raja Azlan Shah and Wan Suleiman F.JJ.) February 9, 1977]

[Kuala Lumpur — Federal Court Civil Appeal No. 80 of 1976]

Bankruptcy — Application to set aside bankruptcy notice and adjudicating and receiving orders — Act of bankruptcy — Bankruptcy Rules, r. 95 — Bankruptcy Act, 1967, ss. 5 and 92.

In this case the respondents had obtained judgment against the appellant. A bankruptcy notice had been issued against the appellant. The appellant filed an affidavit and this operated as an application to set aside the notice. The learned trial judge then postponed hearing the application to set aside the notice from time to time and finally dismissed it, immediately after which he considered the Bankruptcy Petition and issued an Adjudicating Order and Receiving Order. The appellant therefore applied to have the bankruptcy notice and the receiving and adjudicating orders set aside. His application was dismissed in the High Court and he appealed to the Federal Court.

Held: (1) the act of bankruptcy in this case was committed when the learned judge dismissed the application to set aside the bankruptcy notice.

(2) it had not been shown that the learned trial judge was wrong in doing what he did. He had considered the issues raised by the debtors in the various actions and was satisfied that once the act of bankruptcy had been committed on his dismissing the application to set aside the notice, any further delay to provide the respondents with relief would, in the peculiar circumstances surrounding this case and the connected suits, defeat the ends of justice.

Case referred to:-

(1) *In re a Debtor No. 10 of 1953* [1953] 1 W.L.R. 1050.

FEDERAL COURT.

Stanley Ponniah (*Leow Shin Fong* with him) for the appellants.

Wong Soon Foh for the respondents.

Wan Suleiman F.J.: This is an appeal against the dismissal of an application to set aside a bankruptcy notice issued by the respondents the judgment creditors against appellant the judgment debtor, and the Receiving and Adjudicating Orders made by the learned judge immediately thereafter.

The facts set out by the learned judge in his grounds of judgment sum up briefly, but if I may say with respect, most adequately the sequence of events which led to the present appeal. The relevant part of this judgment is set out in extenso hereunder:

"The bankruptcy notices and petitions in these 3 cases were founded on a judgment in Civil Suit No. 187 of 1972. The judgment was for a sum of $152,065.08¢ with interest and costs. It was entered on an O.14 application. But a stay of execution was ordered until the disposal of the counterclaim. An appeal from the decision of the Senior Assistant Registrar on the Order 14 application was lodged but the learned judge who heard it had no difficulty in dismissing the appeal. No further action was taken and the judgment must now stand as a judgment lawfully obtained and perfected. The counterclaim was with leave withdrawn on March 3, 1975. With its withdrawal, the order for stay lapsed and the judgment-creditor could and did proceed with execution. It finally took bankruptcy proceedings. The petitions were for $179,436.78¢ which would include interest and costs.

The reply of the judgment-debtor was to start an action in Civil Suit No. 1583 of 1975 to set aside the judgment.

This case has still to be heard, but there is an application by the creditor to set it aside as an abuse of the process of

the court. But it is to be noted that it was started some 3 years after the case in question.

There were 2 other connected cases. Civil Suit No. 892 of 1972 was commenced to set aside the consent order in Civil Suit No. 82 of 1971 on the same subject-matter. I dealt with this suit on June 7, 1976 as exhaustively as I could. I gave my reason for holding that on the grounds advanced and even taking into consideration the further reason in Civil Suit No. 1583 of 1975 in relation to an alleged 'new discovery' of an assignment, there was no justification to set aside the action. It may be that in so doing, I was dealing prospectively with Civil Suit No. 1583 of 1975.

But the assignment was known to the debtors at all relevant times, being a term of the agreement between the debtors and the creditor. It could not be said to be a fact discovered lately, when reasonable diligence and human ingenuity could not reveal it at the time of the earlier trial. But perhaps it was suggested that the creditor had obtained his judgment by fraud by not disclosing it. I could not understand why a duty was imposed on the creditor to disclose it. If there was any substance in any defence based on this assignment to a company to be incorporated in which two of the debtors were to be the directors and principal shareholders, surely the debtors should themselves raise it and the fact remains they knew or ought to know this existence. But in any event, the assignment was clearly made 'subject to liabilities', so that even if there had been such an assignment and the matter was raised, the defence would not succeed and avoid the liabilities of the debtors under the agreement notwithstanding the assignment."

Appellant's complaint in the first ground of appeal is that there had been no act of bankruptcy within the last 6 months before presentation of the petition so that the Receiving Order and Adjudicating Order made on June 7, 1976 was contrary to section 5(1)(c) of the Act. Mr. S. Ponniah argued that the dismissal of the application to set aside the Bankruptcy Notice on that day did not operate so as to result in an act of bankruptcy having occurred on the same day.

The Bankruptcy Notice, issued on March 24, 1975, was served on April 4, 1975. Excluding the day on which service was effected, payment should be made before midnight of April 11, 1975 after which the 7 day period would lapse. An act of bankruptcy is complete at the last moment of the last day (excluding the day of service) prescribed for compliance (see *Williams* on Bankruptcy — 18th Edition, Page 42). Where, as in this instance, the affidavit to set aside contains a cross-demand, I think the act of bankruptcy is completed the very moment the court dismisses the application to set aside. That assumes, of course, that the registrar has extended the time prescribed for compliance with the Bankruptcy Notice.

Under rule 95(1) of the Bankruptcy Rules, 1969, an affidavit shall operate as an application to set aside. Appellant filed his affidavit (Pg. 5/6) on April 11, 1975 before the period of one week allowed for compliance under the notice lapsed. The appeal records show that the learned judge had postponed hearing the application from time to time, and had finally dismissed it on June 7, 1976 immediately after which his Lordship considered the Bankruptcy Petition and issued an Adjudicating Order and Receiving Order.

The point argued before us and in the court below is whether the various adjournments thus made comply with the requirements under rule 95(2) that the registrar should extend the time for compliance under the notice. If not then the act of bankruptcy would be complete immediately after midnight on April 11, 1975, one week after service of the Bankruptcy Notice excluding the day of service itself.

Conversely if there had been such extension by the registrar, then no act of bankruptcy would have been committed until the moment on June 7, 1976 when the learned judge dismissed the application to set aside the notice.

Rule 95(2) reads:

"If the application cannot be heard before the time specified in the notice for compliance with its requirements, the Registrar shall extend the time, and no act of bankruptcy shall be deemed to have been committed under the notice until the application has been heard and determined."

Mr. Wong for the respondents contends that the filing of the affidavit under rule 95(1) does not automatically result in extension of time when the application cannot be heard before the time specified in the notice. He points out that the English Rule 139(2) is exactly the same as our 95(2), and refers to a passage in *Williams* on Bankruptcy, 18th Edition, at page 43 which says:

"Time for compliance with a notice can only be extended by the Registrar under B.R. 139(2), ... and (it would seem) by no other tribunal. ...",

the authority for which, according to the footnote is *In re A Debtor No. 10 of 1953*.[1] He failed to note what Harman J. said of this rule (Rule 141 of 1915 — substantially the same as Rule 139 of 1952) at page 1054:

"The rule is directory and compels the registrar to extend it 'until the application has been heard and determined'."

The word "it" of course refers to extension of time for complying with the Bankruptcy Notice.

Therefore the fact that the various adjournments on record were made in Open Court by the learned trial judge does not make any difference because the registrar has no choice and may be deemed to have made corresponding extensions of time for compliance with the notice.

The answer to this question does not affect the result of this appeal.

Having dealt with this point, I shall proceed to consider Mr. Ponniah's complaint that the court, having granted the petition immediately after having dismissed the application to set aside the Bankruptcy Notice had disregarded the principle of *audi alteram partem*. If by that Mr. Ponniah means that the appellant was not accorded an opportunity to be heard, the records would show otherwise, for at pages 15 and 16 of the Appeal Records Mr. Leow for the appellant submitted at length on the issue of cross demand and alleged fraud on the part of the respondents. In his second ground of appeal counsel had alleged that in making the Receiving Order and Adjudicating Order the very same day, appellant had been deprived by the court of his statutory right of appeal against the dismissal of his application.

Mr. Ponniah did not elaborate on this ground, and indeed it seems to me to be without merit for section 92(2) of the Bankruptcy Act preserves such right of appeal had appellant been minded to pursue what would clearly be yet another exercise in delaying tactics.

No authority has been cited nor have I been able to find any which says that the learned judge was wrong in doing what he did. He had considered the issues raised by the debtors on the various actions, and was no doubt satisfied that once the act of bankruptcy had been committed on his dismissing the application to set aside the Notice, any further delay to provide the respondents with relief would, in the peculiar circumstances surrounding this case and the connected suits, defeat the ends of justice.

I would therefore dismiss this appeal with costs. Since the grounds of appeal in Civil Appeals No. 81/76 and 82/76 are identical, and are according to learned counsel for the appellant in all these three appeals to be decided on the result of this appeal, appeals Nos. 81/76 and 82/76 are also dismissed with costs. Deposit in respect of each appeal to respondents to account of taxed costs.

Ali Ag. C.J. (Malaya) and **Raja Azlan Shah F.J.** concurred.

Appeal dismissed.

Solicitors: *Arifin & Leow; Chooi & Co.*

CHONG KOK HWA v. TAISHO MARINE & FIRE INSURANCE CO. LTD.

[A.C.J. (Ajaib Singh J.) May 6, 1975]
[Seremban — Civil Appeal No. 1 of 1975]

Insurance — Right of insurers to recover from insured after having paid to 3rd party — Road Traffic Ordinance, 1958, s, 80(1).

Practice & Procedure — Specific plea — Waiver.

The respondents in their statement of claim averred that the appellant insured his vehicle for one year from July 11, 1968 to July 10, 1969. On November 13, 1968 the vehicle was involved in a motor accident while it was being driven by the servant or agent of the appellant resulting in damage and injury to the third party. They further averred that one of the conditions in the policy of insurance was that the appellant should as soon as possible give notice of any accident involving the insured vehicle to the respondents but the appellant failed to do so, and he did not give notice of the accident until November 11, 1970. The injured third party sued the appellant and the driver. The respondents defended the suit and paid the sum of $3,000 as damages for personal injury and $250 costs to the third party on a judgment by consent entered in the High Court against the appellant and his driver on October 4, 1971. The respondents averred that they were entitled to recover the sum of $3,250 on the ground that they had repudiated liability on the policy for breach of the aforesaid condition.

Held: in this case the policy is in the usual form as a commercial vehicle indemnity policy and nowhere did it state that the respondents should obtain the prior approval or consent of the appellant before settling a claim by an injured third party.

On the question of plea of waiver appearing in pleadings expressly or impliedly.

Held: (1) in order to raise the plea of waiver the appellant ought to have specifically pleaded it in the defence;

(2) it may be generally accepted that a particular defence which is required to be specifically pleaded but is not done so with sufficient definiteness may be otherwise discernible from the tenor and language used and thus entitled to be considered as a plea in defence. However it must not all be left to the imagination. There must be some outward appearance of at least a semblance of such a plea. In the present case the appellant filed a fairly comprehensive defence in the lower court but there was no indication anywhere in it that the plea of waiver was being relied on by way of defence.

Cases referred to:-

(1) *Brook* v. *Trafalgar Insurance Co. Ltd.* (1947) 79 Ll.L.R. 365.

(2) *In re Robinson's Settlement, Gant* v. *Hobbs* [1912] 1 Ch. 717.

(3) *Thangaulu* v. *Saudagar Singh* [1965] 1 M.L.J. 38.

(4) *Yeap Yok Tee* v. *Lee Boon Bee* [1973] 1 M.L.J. 3.

CIVIL APPEAL.

A.K.J. D'Cruz for the appellant.

N.A. Marjoribanks for the respondents.

Ajaib Singh J.: This is an appeal from the decision of the learned President of the Sessions Court who had given judgment in favour of the respondents against the appellant in the sum of $3,250 and costs.

The respondents are an insurance company having their registered office in Kuala Lumpur. In their statement of claim the respondents averred that the appellant insured his motor lorry with them for a period of one year from July 11, 1968 to July 10, 1969. On November 13, 1968 the lorry was involved in a motor accident while it was being driven by the servant or agent of the appellant resulting in damage and injury to a third party. The respondents averred further that one of the conditions in the policy of insurance was that the appellant should as soon as possible give notice of any accident involving the insured lorry to the respondents but that the appellant failed to comply with this condition and he did not give notice of the accident until November 11, 1970 almost two years after the accident. In due course the injured third party sued the appellant and the lorry driver who was an authorised driver within the terms of the policy. The respondents defended the suit and paid the sum of $3,000 as damages for personal injury and $250 costs to the third party on a judgment by consent entered in the High Court against the appellant and his driver on October 4, 1971. The respondents averred that they were entitled to recover the sum of $3,250 from the appellant on the ground that they had repudiated liability on the policy for breach of the aforesaid condition.

In his defence the appellant admitted the condition referred to in the statement of claim but denied that he did not give notice of the accident to the respondents. He stated that on or about the day of the accident he informed Chin Kook Chen who at all material times was the agent of the respondents in Seremban and that the said agent undertook to inform the respondents. The appellant contended that he was thus made to believe that he had complied with the said condition, that the respondents were bound by the acts or omissions of their agent and that they were precluded from contending that the appellant had failed to notify the respondents as soon as possible after the accident. Further that the respondents never obtained the appellant's authority to engage solicitors to conduct the defence of the action in which the appellant was named as a defendant. The appellant denied that the respondents were under